No. 92-9059

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Supreme Court of the United States

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,
Petitioner,

v.

SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR PETITIONER

DAVID I. BRUCK *
(Appointed by this Court)
P. O. Box 11744
Columbia, South Carolina 29211
(803) 765-1044

M. ANNE PEARCE
Assistant Appellate Defender
1122 Lady Street
Suite 940
Columbia, South Carolina 29201
(803) 734-1330

* Counsel of Record

Attorneys for Petitioner

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1.

IN THIS CAPITAL CASE, DID THE TRIAL COURT'S REFUSAL TO INFORM THE SENTENCING JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

2.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

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BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Joint Appendix (hereinafter "J.A.") at 164-74. The order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 175.

JURISDICTION

The judgment of the South Carolina Court was entered on February 1, 1993. A timely petition for rehearing was denied on March 10, 1993. The petition for writ of certiorari was filed on June 8, 1993, and granted on October 4, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1275(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that no state may "deprive any person of life . . . without due process of law. . . ."

3. It also involves S.C. Code §§ 16-3-10 *et seq.* (1991 Supp.), which code sections are reprinted in the Appendix to the petition for writ of certiorari at A-8 through A-14.

4. It also involves S.C. Code § 24-21-640 (1991 Supp.), which provides in pertinent part:

> The [South Carolina] board [of probation, parole and pardon] must not grant parole, nor is parole au-

> thorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. Code Ann. § 16-1-60 (1991 Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree . . . [and] burglary in the first degree . . . .

STATEMENT OF THE CASE

Petitioner was indicted in a Richland County, South Carolina state court for the July 1990 beating death of an elderly woman, Ms. Josie Lamb, which occurred during a burglary at Ms. Lamb's home. Arrested the day after the murder, petitioner confessed to killing Ms. Lamb and also to a series of break-ins and sexual assaults against several other elderly women committed over a 14-month period. The week before his capital murder trial was to begin, petitioner pled guilty to first degree burglary and two counts of criminal sexual conduct in connection with two unrelated assaults on elderly women which occurred in August 1989 and June 1990. J.A. 9-13.

Under South Carolina law, these prior convictions for three violent offenses rendered petitioner ineligible for parole consideration in connection with any sentence imposed for any subsequent conviction for a violent offense —including the murder of Ms. Lamb. S.C. Code § 24-21-640 (1991 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 320 (1991). South Carolina law authorizes only death and life imprisonment as punishments

for murder. S.C. Code Ann. § 16-3-20(A) (1991 Supp.). Therefore, the only noncapital sentence that petitioner could receive upon conviction for the murder charge was life imprisonment without possibility of parole.

From the very start of petitioner's trial, the prosecutor recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence. Before the beginning of jury selection, he advised the trial judge that the state was "obviously . . . going to ask [the court] to exclude any mention of parole throughout this trial." J.A. 2. The prosecutor then moved for and obtained an order prohibiting the defense from asking prospective jurors any voir dire questions regarding the entire subject of parole. J.A. 2-7.[1] As a result of this ruling, defense counsel were not permitted to question prospective jurors as to whether they harbored fixed preconceptions about parole eligibility and the actual meaning of a "life" sentence under South Carolina law, or whether they could disregard any such preconceptions and be guided instead only by the instructions of the court.[2]

During both the guilt and sentencing phases of petitioner's trial, the state presented evidence tending to establish that the murder of Josie Lamb was one of a series of brutal attacks upon elderly women—including petitioner's own grandmother—that stretched over a 14-month period ending with petitioner's arrest the day after Ms. Lamb's death. At the sentencing phase, the defense responded

---

[1] The trial court relied on *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole.

[2] The trial judge advised the prospective jurors in his introductory remarks that "[b]y death penalty, we mean death by electrocution." *State v. Simmons*, *supra*, Transcript of Record (hereinafter cited as "Tr.") at 157. At no point during the proceedings, however, did the judge (or anyone else) inform the jury that "life imprisonment" meant imprisonment for life without possibility of parole.

with mitigating evidence tending to show that petitioner's violent behavior stemmed from serious mental disorders, which were in part the product of many years of neglect and extreme sexual and physical abuse during his childhood and adolescence. J.A. 68-91.

Although the state disputed the reliability of much of the information underlying petitioner's claim of mental disorder, both the state's case for death and petitioner's case for life had in common the recognition that petitioner posed a severe and continuing danger to elderly women. Indeed, the prosecutor made petitioner's admitted dangerousness the core of the state's appeal for a death sentence. He argued that the jury's sentencing verdict "should be a response of society to someone who is a threat," J.A. 110, characterized the issue before the jury as "what to do with [petitioner] now that he is in our midst," *id.*, and repeatedly asserted that the jury's decision to sentence petitioner to death "will be an act of self-defense." J.A. 102, 110-12.

Petitioner's attempt to meet his "future dangerousness" line of attack consisted of two interrelated parts. First, he sought to show that his violent adult behavior was confined to attacks on elderly women, and that there was no reason to expect further acts of violence once he was isolated in a prison setting. J.A. 121. This was supported by the testimony of a number of witnesses who had known petitioner in the community prior to the crimes, and who generally indicated that they found violence to be out of character. Tr. 1685-86, 1694-95, 1941-43, 1945, 1947, 1950.

Second, petitioner introduced evidence tending to establish that he would make a well-behaved and nonviolent inmate if he was sentenced to life imprisonment.[3]

[3] South Carolina declared such "adaptability" evidence irrelevant and inadmissible in *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), but has been required to admit it since this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986).

This evidence included testimony from a female medical assistant and from two supervising officers at the Richland County jail to the effect that petitioner had adapted well to prison life during pretrial confinement. J.A. 92-95. In addition, petitioner offered expert opinion testimony from a clinical social worker and former correctional employee, Richard L. Boyle, who had both reviewed and observed petitioner's institutional adjustment. Mr. Boyle expressed the view, based on his assessment of petitioner's background and of his current functioning, that petitioner could and would successfully adapt to prison should he be sentenced to life imprisonment. J.A. 61-63.

In sum, petitioner's response to the state's future dangerousness argument was that he would not be dangerous so long as he was in prison. The effectiveness of this line of defense depended on the fact that petitioner was legally ineligible for parole and would therefore actually *remain* in prison if given a life sentence. Petitioner therefore asked the trial judge to so instruct the jury in accordance with S.C. Code § 24-21-640. J.A. 21-22; Defendant's Request to Charge No. 3, J.A. 160-61.

In support of his request for an accurate instruction on his parole ineligibility, petitioner proffered outside the presence of the jury evidence that he would not be considered for parole if the jury sentenced him to life imprisonment. Attorneys for the South Carolina Department of Corrections and the Department of Probation, Parole and Pardons confirmed for the court that any offender in petitioner's position was in fact ineligible for parole under South Carolina law. J.A. 10-21. The prosecutor did not question petitioner's ineligibility for parole. He did cross-examine the attorney for the Department of Corrections in an attempt to suggest that petitioner might receive holiday furloughs or other forms of early release. However, this cross-examination succeeded in establishing only that Department of Corrections regulations would further prohibit petitioner's release under

early-release programs such as work-release or supervised furloughs, and that no convicted murderer serving life without parole had ever been furloughed for any reason. J.A. 13-16.[4]

In addition, petitioner offered and the trial judge admitted without objection the results of a scientific statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs a few days before petitioner's trial. This survey showed that only 7.1 percent of all jury-eligible[5] adults questioned firmly believed that a life-sentenced inmate would actually have to spend the rest of his life in prison.[6] Court's Exhibit 11, Table 2; J.A. 152-54. By contrast, nearly half of those surveyed believed that a convicted murderer sentenced to life imprisonment in South Carolina could expect to be

[4] The prosecutor did not attempt to explore the possible effect of gubernatorial commutation on life-without-parole inmates, since South Carolina is one of the few states that does not allow the governor to commute prison sentences. S.C. Const. art. IV, § 14 (1976) (commutation power extends to death sentences only); Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 Vanderbilt L. Rev. 529, 550 n.141 (1990) (listing South Carolina and Alabama as the only death penalty states where "a murderer [can] be put behind bars with no potential release mechanisms of any kind under a life-without-parole sentence"). *Cf. California v. Ramos*, 463 U.S. 992 (1983).

[5] To ensure that the sample was representative of potential jurors who were actually eligible to serve on capital juries, the poll ascertained whether each respondent's opinion concerning the death penalty depended upon the circumstances of individual cases. As a result, the sample was effectively "death-qualified" and "life-qualified" in a way roughly equivalent to the jury selection process in South Carolina capital trials. J.A. 150-52.

[6] When first asked whether life-sentenced inmates could be considered for release, 20 percent of the sample said no. Table 1, J.A. 152-53. However, when asked to specify how long a life-sentenced murderer would have to serve, only 7.1 percent gave "life." J.A. 154.

released from prison in less than twenty years; nearly three-quarters believed that release would occur after less than thirty years. *Id.* Finally, more than three-quarters of those surveyed stated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer would actually have to serve in prison would be an "extremely important" or "very important" factor in their own choice between life and death. Table 3, J.A. 155.

Based on this public opinion polling data and on the evidence already before the jury concerning petitioner's history of violent behavior outside of prison, petitioner argued that fear of his possible release on parole would likely influence the jury's deliberations unless the court gave an accurate instruction as to the unavailability of parole in petitioner's particular case. J.A. 34-38. The prosecutor continued to oppose such an instruction: after suggesting at one point that the court should "tell the jury [that] parole or the possibility thereof is none of your concern," he finally urged the court "not to allow . . . any argument by state or defense about parole and not charge the jury on anything concerning parole." J.A. 34-37. The trial judge ultimately adopted the prosecution's position and refused petitioner's requested instruction, citing the state supreme court's then-recent decision in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). J.A. 39-45.[7]

Having failed in his efforts to have the trial judge provide the jury with accurate information concerning his ineligibility for parole, petitioner next requested that the judge give the following instruction:

[7] *Torrence*, decided just a month before petitioner's trial, overruled *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987), in which the South Carolina Supreme Court had instructed trial courts to charge on parole ineligibility when requested to do so by the defendant.

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different from what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

Defendant's Request to Charge No. G, J.A. 162. The trial judge refused this instruction, but stated that he would give a somewhat similar instruction if and when the jury inquired about petitioner's parole eligibility. J.A. 45, 96.

Following these rulings, the prosecutor successfully moved to prohibit defense counsel from "making any representations to the jury as to what [a life] sentence may or may not mean." J.A. 57.[8] As a result, the defense arguments contained nothing from which the jury might have inferred that petitioner would be ineligible for parole if sentenced to life imprisonment.

Petitioner attempted unsuccessfully to obtain a parallel limitation of the prosecutor's jury argument. Asserting that the trial court's refusal of his requested parole instruction made it impossible for him to meet the state's

---

[8] The prosecutor based his motion upon *State v. Stewart*, in which South Carolina Supreme Court criticized a defense attorney for *inaccurately* assuring the jury that his client would "be in jail for his entire life" if sentenced to life imprisonment. 283 S.C. 104, 320 S.E.2d 447, 451 (1984). The *Stewart* court characterized defense counsel's assertion as "patently misleading and improper" because the defendant in that case would actually have been eligible for parole in 20 years.

future dangerousness claim, petitioner urged on the authority of *Gardner v. Florida*, 430 U.S. 349 (1977) that the prosecutor should be prohibited "from arguing or implying that the defendant will pose a risk of future violent behavior unless sentenced to death." J.A. 55-56. The trial judge denied petitioner's motion. He cautioned the prosecutor to confine his argument to the record, but he explicitly upheld "the right of the state to argue the defendant's dangerous propensity." J.A. 56-57. As noted earlier, the prosecutor made full use of this right in his penalty phase summation. He reminded the jury that even "[petitioner's] own psychologist, Dr. Evans, testified he is dangerous," J.A. 102, characterized the issue as what to do with petitioner "now that he is in our midst," J.A. 110, and repeatedly described the jury's decision for death as a simple matter of "self-defense." J.A. 110, 112.

After deliberating on petitioner's sentence for some 90 minutes, the jury sent out the following note:

> JUNE 30, 1991
>
> JUDGE ANDERSON,
>
> DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?
>
> /s/ JAMES E. WRIGHT
> JURY FOREPERSON

J.A. 145, 163. The jury returned to the courtroom where, over petitioner's objection, the trial judge gave this instruction:

> Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your

> consideration. The terms of life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

J.A. 146. Twenty-five minutes after having its question about the parole answered in this fashion, the jury returned to the courtroom with a sentence of death. J.A. 148-50.

On appeal to the South Carolina Supreme Court, petitioner argued that concealment from the jury of his parole ineligibility violated the federal constitution in three separate ways. First, he contended that parole ineligibility was " 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,' " *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), and that he was therefore entitled to have the jury informed of his ineligibility under well-established Eighth Amendment principles. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Second, relying on *Beck v. Alabama*, 447 U.S. 625 (1980), he asserted that by withholding from the jury the life-without-parole sentencing alternative that state law actually provided, the trial court had impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment. And third, citing *Gardner v. Florida*, 430 U.S. 349 (1977), he argued that his due process right to rebut the state's affirmative case for death had been denied by the trial court's refusal to permit him to show that a noncapital sentence could adequately protect society from any future acts of violence by him.

The state court rejected petitioner's arguments and affirmed. The court began by noting its own prior decision in *State v. Torrence*, in which a majority of the court had concluded that parole was "not a mitigating circumstance" and that the issue of whether and what to charge capital sentencing juries on the subject was, under *California v. Ramos*, 463 U.S. 992 (1983), "solely a matter of state

law." *State v. Simmons*, 427 S.E.2d 175, 178 (S.C. 1993), J.A. 170. The state court then declined to further address petitioner's specific Eighth Amendment and due process claims. Instead, over Justice Finney's dissent, the court ruled that the trial judge's belated parole instruction, given in response to the jury's mid-deliberation inquiry, "satisfies in substance appellant's request for a charge on parole ineligibility." *Id.* at 179, J.A. 171. The state court did not disagree with petitioner's submission concerning the importance of his parole ineligiblity in the jury's sentencing deliberations. Nor did it hold that the first part of the trial judge's supplemental instruction—in which he admonished the jury not to consider parole or parole eligibility—actually sufficed to remove that issue from the case.[9] Rather, the state supreme court majority simply asserted that "a reasonable juror would have understood" the trial judge's "plain meaning" instruction as signifying "that life imprisonment indeed meant life without parole." *Id.* The state court denied rehearing by a four-to-one vote, J.A. 175, and this Court granted certiorari.

SUMMARY OF ARGUMENT

The state's case for the death penalty rested heavily on the claim that petitioner posed an unacceptable risk of violence in the future. For this reason, the trial court's refusal to inform the jury that its "life imprisonment" sentencing alternative would have rendered petitioner permanently ineligible for parole violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1979)). Petitioner did present evidence that he would probably prove to be nonviolent and co-operative *in prison*. But that evidence was an insuffi-

[9] Any such suggestion would have been contradicted by the state court's own precedent. *See infra*, at 18-19.

cient response to the state's future dangerousness claim unless the jury was also satisfied that he would actually *remain* in prison if sentenced to life imprisonment. The jury's mid-deliberation question about parole eligibility plainly showed the importance of this issue. South Carolina's no-parole statute for repeat violent offenders provided him with a powerful answer to the jury's understandable concern, and the trial judge should have granted petitioner's request to make that answer known to the jury.

The answer that the trial judge *did* give—that parole eligibility was "not a proper issue" for the jury's consideration, and that life imprisonment should be understood in its "plain and ordinary meaning"—fell far short of conveying that petitioner would in fact have been ineligible for parole if sentenced to life imprisonment. The admonition not to consider parole eligibility actually suggested that petitioner *would* be eligible for parole. In addition, empirical evidence in South Carolina and throughout the nation overwhelmingly shows that the "plain and ordinary meaning" of life imprisonment is imprisonment until release on parole. When the instruction is viewed in the context of the record as a whole—including the evidence and arguments, the jury's question about parole, and the swiftness with which a death sentence followed the judge's parole instruction—there exists at least a reasonable likelihood that the jury did not interpret the trial court's seemingly evasive answer to its very simple question about parole as signifying that petitioner would never be eligible for parole if the jury spared his life. *Boyde v. California*, 494 U.S. 370 (1990).

In addition to denying petitioner his due process right to rebut the state's case for death, the trial court's refusal to provide the sentencer with this crucial information about its noncapital sentencing alternative also violated two separate lines of this Court's Eighth Amendment jurisprudence. First, it impermissibly undermined the reliability of the jury's sentencing judgment by concealing

both the incapacitative and retributive effect of the noncapital punishment provided by state law. *California v. Ramos*, 463 U.S. 992 (1983); *Beck v. Alabama*, 447 U.S. 625 (1980). And second, by depriving the jury of an especially critical "relevant circumstance that could [have] cause[d] it to decline to impose the [death] penalty," *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987), the trial court violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Skipper v. South Carolina*, 476 U.S. 1 (1986).

The practices of other states that employ jury sentencing and life without parole sentences overwhelmingly support petitioner's position. The fact that 20 out of 23 comparable states inform sentencing juries of the defendant's parole ineligibility shows a "nearly universal acceptance [that] . . . establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. at 636-37. By contrast, South Carolina's approach needlessly undermines the jury's historic function in the evolution of society's standards of decency in criminal punishments, and created in this case a constitutionally intolerable risk of an unwarranted or erroneous death sentence.

ARGUMENT

In *California v. Ramos*, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n. 30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[10] In recent years, however, with the steady expan-

[10] *See generally* W.E. Shipley, Annot., *Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon*, 12 A.L.R.3d 832 (1967).

sion of "life without parole" statutes,[11] parole for life-sentenced murderers has increasingly moved from a real possiblity to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury that must sentence him.

I. THE TRIAL COURT'S REFUSAL TO INFORM THE JURY OF PETITIONER'S PAROLE INELIGIBILITY, COUPLED WITH THE STATE'S EMPHASIS ON PETITIONER'S ALLEGED FUTURE DANGEROUSNESS, VIOLATED HIS DUE PROCESS RIGHT TO REBUT THE STATE'S CASE FOR THE DEATH PENALTY.

It would seem almost self-evident that the Eighth Amendment entitles a capital defendant to provide the sentencing jury with the most basic information concerning its non-capital alternative—namely, that state law will keep him in prison, and thereby protect society, if the jury spares his life. Yet the Court need not reach that issue in this case, and may choose not to do so, since the case can be decided on a narrower ground. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 n. 4 (1986); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985), and authorities cited therein. Because the prosecutor at petitioner's trial argued for a death sentence specifically on the ground of petitioner's future dangerousness, the denial to petitioner of the essential means to meet that argument by informing the jury truthfully that a life sentence would permanently end such future danger amounted to a denial of due process in the

[11] *See generally* Wright, *supra* n.4, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

fundamental sense of " 'a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

A. Why the Trial Court's Refusal to Inform the Jury of Petitioner's Parole Ineligibility Violated the Rule of *Gardner v. Florida*.

The state premised its argument in favor of the death penalty on the factual assertion that society could not defend itself against petitioner in the future unless he was sentenced to die. Now that petitioner was "in our midst," the prosecutor asserted that a death verdict was simply "self-defense," the "response of society to someone who is a threat." J.A. 110, 112. At trial, petitioner made one response to this claim: he showed that he posed no threat to anyone so long as he remained in prison. On this point, petitioner's evidence was strong and unrebutted.

Petitioner's response, as the jury heard it, however, was insufficient to meet the prosecutor's attack. For witnesses on both sides agreed that petitioner would remain a threat if he were ever released from prison, and the prosecutor argued that petitioner posed a threat not to prison staff or inmates, but to "people who can't fight back, who can't resist . . . the old . . . the infirm . . . ." J.A. 105. The jurors obviously recognized that further response was needed, for their note asked for the one piece of information without which the petitioner's case fell short: whether petitioner could be paroled if the jury spared his life.

In fact, petitioner was prepared to offer a response to the very question the jurors asked: as a matter of unambiguous statutory law, petitioner could *never* be paroled. But the jurors never heard that response, because the trial judge forbade petitioner to make it.

In so doing, the trial judge violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper v. South Carolina*,

476 U.S. at 5 n. 1 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1979)); *see also O'Dell v. Thompson*, 112 S.Ct. 618, 619 n. 3 (1991) (Blackmun, J., respecting denial of certiorari) (three members of the Court characterize as a "substantial federal claim" death-sentenced prisoner's argument that his right to rebut the prosecution's case for death was violated by the trial judge's refusal to inform the jury that the only available alternative to death was life without parole, where the prosecutor referred at trial to defendant's prior parole violation). In *Skipper*, all members of this Court agreed that the prosecutor violated the *Gardner* principle when he argued to the sentencing jury that the defendant would probably misbehave in prison after the trial judge had excluded evidence of the defendant's actual record of good behavior while awaiting trial in the county jail. 476 U.S. at 5 n. 1 (majority opinion); *id.* at 9-11 (Powell, J., concurring in the judgment). Egregious though it was, that violation of "fundamental due process" pales in comparison to what happened here. This is so because a capital defendant's ineligibility for parole over the entire span of his natural life is a far more important determinant of whether he will pose an unreasonable risk of further violence than his behavior in jail during the few months immediately preceding his trial, and the fact that a defendant can never be paroled may be expected to weigh much more heavily in a jury's deliberations than will the necessarily speculative predictions of future behavior involved in *Skipper*.[12] Espe-

[12] This is borne out both by the fact that petitioner's jury found the issue important enough to ask about during deliberations, and by petitioner's statewide survey, which showed that more than three-quarters of jury-eligible respondents believed the amount of time a convicted murderer would actually have to serve in prison to be an "extremely important" or "very important" factor in a capital sentencing decision. J.A. 155. As will be seen, public opinion and juror survey research in South Carolina and throughout the nation corroborate petitioner's estimation of the critical importance of parole eligibility as a capital sentencing consideration. *Infra* at 20-23.

cially in this case, where the defendant's entire history of violent behavior was of a kind—attacks on elderly women—that could not possibly recur in a prison environment, the fact that he would be imprisoned without possibility of parole for his entire life if not executed was highly relevant to the issue of his future dangerousness.

The issue was brought into focus by the state's introduction of petitioner's record of prior violent offenses to show his violent propensity—the very record that rendered him permanently ineligible for parole. Once the prosecution presented evidence that petitioner had acted very violently while he was at large in the community, the next logical question—the question that the jury actually asked—was whether there existed any reasonable possibiilty of his being paroled back into that community. By refusing to inform the jury of the unambiguous answer that state law provided, the trial court severely impaired petitioner's ability to meet the state's case for the death penalty.

This one-sided presentation on the issue of future dangerousness was inherently unfair. Although the prosecution was permitted to make unlimited use of petitioner's prior convictions as reasons to sentence petitioner to death, the court barred petitioner from informing the jury that these same convictions operated to diminish substantially any threat of similar acts of violence by him in the future. *See Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985) (where state relied on psychiatric testimony to prove future dangerousness at capital sentencing hearing, denial of state funds for defense psychiatrist violated due process).

B. The Trial Judge's Ambiguous Answer to the Jury's Parole Inquiry Was Not a Constitutionally Adequate Substitute for Accurate Information.

The respondent will presumably rely upon the state supreme court's conclusion that the trial court's confusing and evasive response to the jury's parole question was the equivalent of an accurate no-parole instruction, and

that it therefore satisfied the requirements of due process. However, the state court's conclusion is unsupported by logic or the record of the proceedings below. At a minimum, there is a "reasonable likelihood" that the jury did not understand the judge's "plain and ordinary meaning" instruction as saying that petitioner could never be released on parole. *Boyde v. California,* 494 U.S. 370, 380 (1990). This is so for several reasons.

1. *The cautionary instruction.*

The first and second sentences of the judge's response ("you are not to consider parole" and "[parole is] not a proper issue for your consideration") actually suggested that a life sentence *did* carry the possibility of parole, but that the jury should let some other authority concern itself with that fact. Indeed, in *State v. Smith,* 298 S.C. 482, 381 S.E.2d 724 (1989), *cert. denied,* 494 U.S. 1060 (1990), the South Carolina Supreme Court remarked that similar cautionary instructions in response to jury inquiries about parole actually convey the message that parole *did* exist, and cause precisely the kind of harm that instructions of this sort are supposed to prevent:

> In [*State v.*] *Johnson,* [293 S.C. 321, 360 S.E.2d 317 (1987)], the trial court charged the jury that "the possibility of parole is of no concern of yours"; in [*State v.*] *Plemmons,* [296 S.C. 76, 370 S.E.2d 871 (1988)], the trial court instructed jurors that "you are not to concern yourself with [parole]." . . . The *Johnson* and *Plemmons* juries, instructed only that parole was not their concern, would have logically inferred that parole was someone *else's* concern. Simply put, those juries were practically invited to speculate about parole eligibility.

381 S.E.2d at 727 (emphasis in original).[13] As *Smith* shows, South Carolina has implicitly acknowledged that a jury question concerning parole eligibility in a case such as this one is among those few settings "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States,* 391 U.S. 123, 135 (1968). And where the trial court could so easily have removed the need for a cautionary instruction simply by telling the jury the truth about petitioner's ineligibility for parole, the court's refusal to do so is constituionally intolerable.[14]

Moreover, even in the unlikely event that the cautionary instruction had been effective in stifling the jury's discussions about parole, that would not suffice to protect petitioner's due process rights. For once the prosecution was permitted—over defense objection—to argue that petitioner's future dangerousness was a reason to sentence him to death, petitioner was entitled to have his ineligibility for parole considered by the jury as a circumstance that powerfully undercut the persuasiveness of the state's argument. Due process guaranteed petitioner the opportunity to meet the state's dangerousness argument with the single piece of information most likely to assuage the jury's concerns. That opportunity having been denied, the instruction to disregard parole did not cure the resulting due process violation—just as a jury instruction to disregard the issue of the petitioner's likely future conduct

[13] For a review of the evolution of South Carolina law governing parole consideration by capital sentencing juries before the advent of life without possibility of parole, see James M. Hughes, Note, *Informing South Carolina Capital Juries About Parole,* 44 S.C. L. Rev. 383 (Winter 1993).

[14] Petitioner does not suggest that an instruction not to consider parole would be constitutionally suspect in any jurisdiction that actually did authorize parole for convicted capital murderers. *See Johnson v. Texas,* 113 S.Ct. 2658, 2662 (1993) (noting that jury was instructed "not to consider or discuss the possibility of parole"). Where parole is a real possibility for a life-term murderer (as it was *Johnson,* for example, where the defendant would have been eligible for parole in 20 years had death not been imposed, Tex. Code Crim. Proc. Ann. art. 42.18, § 8(b) (West 1985)), cautionary instructions may be the only way to protect the defendant without affirmatively misleading the jury.

in prison would not have cured the due process violation in *Skipper v. South Carolina*. For all of these reasons, the trial judge's instruction to the jury that parole was "not a proper issue for your consideration" failed to restore the fairness of the sentencing proceeding.

2. *The "plain and ordinary meaning" instruction.*

This leaves the instruction that the jury was to understand the term life imprisonment in its "plain and ordinary meaning." The effectiveness of this instruction obviously depended on whether, to the jurors who heard it, the "plain and ordinary meaning" of the term "life imprisonment" was life without possibility of parole. There is no reason to believe that the jurors who sentenced petitioner to death understood the term "life imprisonment" in this way, and substantial reason to think otherwise. *State v. Smith*, 381 S.E.2d at 728 (Chandler, J., dissenting) ("the reality, known to the 'reasonable juror,' [is] that, historically, life term defendants have been eligible for parole").

a. *Public opinion and juror surveys on "the meaning of 'life'".*

Because the prosecution successfully prevailed upon the trial judge to prohibit any voir dire inquiry into the matter, the record does not show for certain what the jurors thought on this question. *Cf. State v. Henderson*, 109 N.M. 655, 658, 789 P.2d 603, 606 (1990) (voir dire statements of jurors revealing their erroneous beliefs about capital defendant's eligibility for parole showed need for accurate parole instruction). On the other hand, petitioner's statewide public opinion poll established that for the large majority of jury-eligible South Carolinians, "life imprisonment" means both the possibility that a murderer will be released after a period of years and the probability that he will be.

The reliability of the University of South Carolina poll was unchallenged below, and the fact that numerous surveys throughout the nation have produced similar results

strongly supports its conclusions. Especially striking are the results of a recent survey of 114 actual South Carolina capital jurors, drawn from a total of 31 cases tried between 1986 and 1992. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (Nov. 1993). This survey showed not only that these jurors understood "life imprisonment" to mean that the defendant would eventually be released, but that the jurors' actual estimates of when that release would occur correlated strongly with their sentencing decisions. Specifically, jurors who imposed the death penalty estimated the likely period of imprisonment for a capital murderer at an average of 16.8 years, while members of juries that did not return death sentences put the period of incarceration at 23.8 years. *Id.*, Table 2, at 7. Summarizing this data, Eisenberg and Wells concluded that "jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death," while "[j]urors who believe the alternative treatment is longer tend to sentence to life." *Id.*

This finding—that the actual sentencing decisions of capital juries tend to correspond to the jurors' predictions concerning the likely effective length of their "life" sentence alternatives—has been replicated in other states. William J. Bowers, *Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc. Rev. 157, 169-70 (1993). Using post-trial juror interviews data from California and Florida as well as the South Carolina data described by Eisenberg and Wells, Bowers found that

> [i]n each of these three states, believing that convicted first-degree murderers would get out sooner is associated with voting for death. Notably, the relationship between belief in early release and voting for death is more pronounced as fewer jurors in the state appear to know what the mandatory minimum sentence is. Thus the difference is . . . most pronounced

in South Carolina where fewer than 15% appear to know the mandatory minimum.

Id.[15]

National public opinion surveys and research in other states provide still more proof that, to the vast majority of Americans, "life imprisonment" means "life imprisonment until parole." *See, e.g.*, Frank A. Bennack, Jr., *The Public, the Media and the Judicial System*, 7 State Ct. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminals sentenced to "life imprisonment" would not spend rest of life in prison); Anthony Paduano & Clive Stafford Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Human Rights L. Rev. 211, 222 n. 33 (1987) (hereinafter, *Deadly Errors*) (randomly selected capital jury veniremen in Cobb County, Georgia believed, on average, that "life sentence" meant imprisonment for 8.1 years); *id.* at 223-25 n. 35 (summarizing results of county-wide survey in Georgia and of jury venire survey in Mississippi, which both showed that estimates of anticipated "life sentence" duration averaged ten years or less); William W. Hood, III, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 n. 101 (1989) (median estimate by jury-eligible residents of Prince Edward County, Virginia of time that capital murderer would actually spend in prison on "life imprisonment" sentence was 10 years); Marshall Dayan *et al., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23

[15] The significance of the South Carolina juror survey data is all the greater in this case, because the South Carolina "mandatory minimum" to which Bowers referred was 30 years—the term that must be served prior to parole eligibility by convicted capital murderers who, unlike petitioner, have no prior convictions for violent offenses. S.C. Code Ann. § 16-3-20(A) (1993 Supp.). The data cited by Bowers reveal that of 114 actual South Carolina capital jurors interviewed, only a negligible number—3.7 percent—understood a life sentence to mean (as it did in petitioner's case) life without parole. *Bowers, supra* at 170, Table 6.

Loy. L.A. L. Rev. 151, 171 (1989) (post-trial interviews of 30 Maryland capital jurors showed that half believed life term inmates would typically serve no more than 10-15 years in prison). In sum, both state and national research provides powerful corroboration for the conclusion of petitioner's statewide public opinion survey that (1) almost no jury-eligible South Carolinians understand the "plain and ordinary meaning" of life imprisonment to be life without parole, and (2) defendants' parole-eligibility (real or imagined) would weigh heavily in most jurors' sentencing decisions.

b. *Legislative History.*

If any more evidence were required that petitioner's jury probably did not understand the "plain meaning" of life imprisonment as excluding the possibility of parole, it can be found in the legislative history surrounding enactment of South Carolina's no-parole provision. During 1985 and 1986, responding to intense public concern about violent crime, the South Carolina General Assembly took up a comprehensive set of criminal justice reform proposals. 1985 S.C. Senate J. 1316. Included among these was a proposal to abolish parole for life term inmates who had been convicted of murder with aggravating circumstances. This life-without-parole proposal initially passed the state House of Representatives, but encountered vociferous opposition from law enforcement officials and prosecutors who feared that such a sentencing alternative would encourage juries not to impose the death penalty in capital cases.[16] Prosecutors insisted that providing juries with a life-without-parole option " 'objectively, over the

[16] One state senator summed up the views of those opposing life without parole during debate on the Senate floor. "[I]f we pass [life without parole], let's close the death house . . . [and] transfer the chair to the state museum." This senator explained that "a juror considering the death penalty will think, 'I can put that person away forever, and my conscience will be clear.' " G. Rigsby, "Senate OKs amended crime bill," *The State* (Columbia, S.C.), March 20, 1986, at 8C.

long haul,' would do away with the death penalty." [17] At the same time, a coalition of high-ranking state law enforcement officials asserted in a letter to the legislature that enacting a life-without-parole sentence "will increase the risk of major crime by encouraging juries to refrain from applying the existing death penalty." [18] Based largely on these views, the state Senate voted to delete life without parole from the anti-crime legislative proposal. 1986 S.C. Senate J. 1071, 1079. The House, however, refused to accept the Senate's rejection of life without parole. Eventually state representative Jean H. Toal, a House leader on the crime bill, proposed a way out of the legislative impasse. Rep. Toal argued that jury decisions in capital cases would not be affected by the no-parole provision because trial judges would not let jurors know about it.

> Mrs. Toal said she disagrees with people who say death [sic] without parole would make the death penalty obsolete.
>
> *Judges would not permit juries to be told anything about a prisoner's chances for serving life or being paroled, she said.*
>
> Ms. Toal said juries would continue to consider a penalty based on the heinous nature of a crime, rather than the possibility of parole.

D. Kern, "House, Senate deadlocked on crime bill," *The State* (Columbia, S.C.), March 27, 1986, at 1C (emphasis added). Ultimately, the state legislature agreed to a compromise under which aggravated murders would be punishable by life imprisonment without eligibility for parole for a minimum of 30 years, and sentences of life without possibility of parole would be reserved for offenders (like petitioner) with prior convictions for violent crimes. *See* 1986 S.C. Acts 2983, 2990; S.C. Code Ann. §§ 16-3-20(A), 24-21-640 (1991 Supp.).[19]

[17] D. Kern, "Anders argues against life without parole, "*The State* (Columbia, S.C.), March 16, 1986, at 4B.

[18] Associated Press, "Crime bill stalemate continues," *The State* (Columbia, S.C.), May 1, 1986, at 12C.

The significance of this legislative history is that it shows how widespread is the recognition, among South Carolina legislators, police officers, and prosecutors, that to South Carolina jurors the "plain meaning" of life imprisonment is "life imprisonment until release on parole," *and that jurors sentence accordingly in capital cases unless instructed otherwise.* Given this history, and in view of the other overwhelming evidence that capital jurors frequently base their sentencing decisions on their exaggerated estimations of the availability of parole, *see supra* at 20-23, there is no basis for the state supreme court's expressed confidence that the trial judge's belated instructions adequately conveyed that petitioner would never be eligible for parole if the jury spared his life.

3. The context of the "plain meaning" instruction.

The record shows that the jury was concerned enough about the subject of parole eligibility to ask for further instructions. This fact alone casts some doubt on any assumption that the jurors understood the "plain and ordinary meaning" of life imprisonment to exclude the possibility of parole: indeed, it was presumably that same

[19] Rep. Toal's prediction that these limitations on parole eligibility would be withheld from capital sentencing juries was briefly proven wrong, when the South Carolina Supreme Court ruled that capital defendants were entitled upon request to a jury instruction concerning the newly-enacted restrictions. *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302, 305-06 (1987). However, less than four years later, in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the state supreme court expressly overruled *Atkins*, and held that jury instructions should not include any specific information about parole ineligibility, but should simply direct juries to interpret the term life imprisonment "in its plain and ordinary meaning." 406 S.E.2d at 320 (Chandler, J., concurring for a majority of the court). As noted earlier, petitioner's sentencing hearing began just one month after *Torrence* abandoned the practice of providing full information to capital sentencing juries concerning the parole ineligibility of convicted murderers.

"ordinary meaning" that led the jurors to ask about parole. And it was surely reasonable for the jurors to assume that, if state law actually barred petitioner from parole consideration, the trial judge would have answered their straightforward "yes or no" question about parole with an equally straightforward "no."

As *Boyde v. California*, 494 U.S. 970 (1990), teaches, the setting in which an instruction occurs is important in assessing how the jury probably interpreted it, *accord Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993); and whether more carefully tailored instructions were necessary. *Accord Taylor v. Kentucky*, 436 U.S. 478, 486-88 (1978). In *Boyde*, the Court declined to assume that jurors who had just listened to four days of mitigation testimony would have interpreted a single jury instruction as barring all of it from their consideration. 494 U.S. at 383-84. Likewise, in this case the trial judge's indirect and rather complex answer to what was in truth a very simple question conveyed its own, unspoken meaning: "Yes, the defendant *will* be eligible for parole, but you're supposed to pretend otherwise while passing sentence."

The fact that the jury returned to the courtroom with a death verdict just minutes after hearing its parole question answered in this fashion underscores the likelihood that the jury understood the judge's answer in this way. Given that parole was obviously an important issue to at least some members of the jury before the jurors returned to the courtroom with their question, one would not expect the jury to have voted unanimously for death so quickly after having been genuinely reassured on this critical issue.

Of course, petitioner cannot conclusively disprove the state supreme court's assumption that the supplemental instruction assuaged rather than exacerbated the jury's concern about parole. But his burden under *Boyde* is not so heavy as that: rather, he need only show a reasonable likelihood that the judge's circuitous instructions were substantially less effective than the truth would have been. In assessing whether such a reasonable likelihood exists, the swiftness with which the adverse verdict followed the instruction is surely entitled to some weight.

So, too, is the position taken by the prosecutor at trial. Contrary to the state's argument on appeal, its position at trial with respect to the various instructions proposed and given suggests that it favored the "plain and ordinary meaning" instruction precisely because such instructions encouraged the jury to assume parole eligibility in passing sentence. If the prosecutor really believed, as the state court later held, that the jury would interpret the "plain meaning" charge as meaning that petitioner would never be eligible for parole, it is hard to understand the state's vigorous opposition to any instruction that plainly stated petitioner's ineligibility in so many words. *See supra* at 3, 7-8. While the prosecutor's subjective motivation is not relevant in and of itself, it does suggest that the prosecution itself took a different view of how the jury would understand the "plain and ordinary meaning" instruction than the state, represented by new counsel, now professes on appeal.

Finally, the "plain meaning" instruction came too late. A fair reading of this record is that the jury had focused its attention on the possibility of petitioner's release on parole before it returned to the courtroom to ask about it, and the judge's unnecessarily evasive response simply sealed petitioner's fate. The jury had heard evidence from the prosecution that petitioner had committed acts of irrational and extreme violence against elderly women over a period of months, and from the defense that these acts of violence stemmed from serious and deep-seated mental disabilities that petitioner appeared largely powerless to control. Therefore, by the time it asked about parole, the jury had likely concluded that no parole-eligible sentence could adequately protect society. Under these circumstances, the record does not support the state supreme

court's conclusion that the "plain meaning" instruction served as an adequate substitute for a simple "no" in response to the jury's question about whether petitioner would be eligible for parole if sentenced to life imprisonment.

II. THE EIGHTH AMENDMENT ENTITLES A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED OF HIS INELIGIBILITY FOR PAROLE UNDER STATE LAW.

Petitioner has argued in the foregoing section that he had a due process right to inform the jury of his lifelong parole ineligibility in response to the prosecution's claim that only his execution could protect society from his violent behavior. Even had the prosecution not p essed this "future dangerousness" rationale for the death penalty, however, the Eighth Amendment's bar against arbitrary and capricious infliction of the death penalty would have entitled him to have the capital sentencing jury accurately informed of the meaning of its "life imprisonment" alternative.

As the joint opinion of Justices Stewart, Powell and Stevens put the matter in *Gregg v. Georgia,*

> [i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.

428 U.S. 153, 190 (1976). Since *Gregg,* the Court has implemented this fundamental constitutional principle by prohibiting procedures that needlessly undermine the reliability of the capital sentencing process, *e.g., Beck v. Alabama,* 447 U.S. 625 (1980); *Caldwell v. Mississippi,* 472 U.S. 320 (1985), and by requiring that the sentencing authority consider all relevant evidence why death should *not* be imposed in a particular case. *Lockett v. Ohio,* 438 U.S. 586 (1978); *Skipper v. South Carolina,* 476 U.S. 1 (1986). What happened here violated this Court's precedents in both of these areas.

A. Reliability.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson v. Mississippi,* 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted). The withholding of the defendant's lifelong parole ineligibility from a jury that must sentence him either to death or to "life imprisonment" offends this principle. By distorting the jury's view of both the incapacitative and retributive effect of the noncapital sentencing alternative, it introduces a needless risk that the jury will be moved to impose the death penalty to eliminate the nonexistent danger of release on parole.

This record shows the risk of error most clearly in the jury's exercise of an ill-informed incapacitative judgment. Given the graphic and undeniably shocking evidence of petitioner's repeated attacks on elderly women, no responsible juror could avoid the question, "If I vote to spare his life, what then?" As a matter of simple common sense, the answer to this question depended in large part on whether petitioner would be securely imprisoned for the rest of his life, or whether he might be released on parole. *See California v. Ramos,* 463 U.S. 992, 1002-09 (1983) (noting relevance of possible gubernatorial commutation of sentence of "life without possibility of parole" to issue of defendant's possible future dangerousness).[20] And that is why the jury asked about parole.

[20] As noted above, *supra* at n.4, the precise issue addressed in *Ramos* could not arise under South Carolina law, since the governor may not commute a prison sentence.

By withholding the answer that state law actually provided, the trial court permitted the jury to sentence petitioner while laboring under a fear arising from an impossibility—a fear which, though groundless in fact, was surely powerful enough to overcome any mitigating considerations. This Court's decisions have frequently recognized the importance of such predictions of future conduct in the capital sentencing process. *Jurek v. Texas*, 428 U.S. 262 (1976); *California v. Ramos, supra*; *Barefoot v. Estelle*, 463 U.S. 880 (1983). It would defy logic to suppose that a jury entrusted with the highly subjective and discretionary decision whether to take or spare the life of a defendant such as this petitioner would be unaffected by the possibility of his being loosed upon society at some point in the future.

The withholding of such important information about the severity of the available life imprisonment option also impaired the jury's retributive judgment. Life without parole is a much harsher punishment than life with the possibility of parole release, not only because of its effect on the prisoner decades hence, but because from the very beginning of his sentence the prisoner is stripped of all hope of freedom or respite. *See* Wilbert Rideau and Ron Wikberg, *Life Sentences* 49-50, 57, 247-56 (1992) (describing hopelessness produced by life without parole sentences in Louisiana). Simply put, a jury's decision between life and death might well turn on the extent to which the severity of the particular form of "life" imprisonment corresponds to the grievousness of the crime that the defendant committed. A capital sentencing jury must make a retributive judgment, and it will make that judgment whether it is given accurate information or forced to rely on uninformed speculation. In a matter so necessarily imprecise and so governed by jurors' subjective emotions, any perception of unwarranted leniency will have its effect, and so it did in this case.

Beck v. Alabama, 447 U.S. 625 (1980), is analogous. In *Beck*, the Court struck down a portion of Alabama's

death penalty statute that precluded the jury from considering lesser included offenses of capital murder. The *Beck* Court recognized that where the evidence would have supported a conviction for a lesser included offense, the "preclusion" clause created an unacceptable risk that the jury might convict the defendant of the greater offense only because the law provided no alternative but outright acquittal, rather than because the evidence actually warranted such a conviction. Like the preclusion clause involved in *Beck*, the trial judge's refusal here to give a clear and comprehensible explanation of the jury's life imprisonment option "enhance[d] the risk of an unwarranted [death sentence]." 447 U.S. at 638. It needlessly pressured the jurors to err on the side of severity, and to impose death simply to foreclose the (illusory) possibility of petitioner's early release, rather than because a death sentence was actually warranted by the evidence. This injection of extraneous and prejudicial considerations into the jury's deliberations "tended to diminish the reliability of the sentencing determination," and "introduce[d] a level of uncertainty and unreliability that cannot be tolerated in a capital case." *Id.* at 638, 643.

Petitioner has already discussed, in connection with the *Gardner* facet of his claim, the reasons why the trial judge's answer to the jury's parole inquiry was constitutionally inadequate to protect petitioner's due process right to rebut the state's case for a death sentence. For all of the same reasons, the "plain meaning" instruction failed to safeguard the reliability of the sentencing process under the Eighth Amendment. In this respect, too, *Beck v. Alabama* is instructive. The "preclusion" clause struck down in *Beck* would have been rendered no more constitutionally acceptable had Alabama law required an instruction that the jury was not to consider the fact that the defendant would be set free completely, despite his possible guilt of a lesser degree of homicide, if the jury acquitted him of any element of capital murder. Once the preclusion clause had needlessly introduced such a

powerful element of irrationality into the jury's deliberations, its effects simply could not be so easily removed. As the *Beck* Court observed, quoting with approval a state supreme court justice's dissenting evaluation of the Alabama scheme:

> "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience."

447 U.S. at 642 (quoting *Jacobs v. State*, 361 So.2d 640, 651-52 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979) (Shores, J., dissenting)). Likewise, to suppose that the jury's fear of petitioner's premature release on parole could be removed simply by informing it that parole was not a proper issue for its consideration would require a "clinical detachment from the reality of human experience" that the Court refused to assume in *Beck*.

Hicks v. Oklahoma, 447 U.S. 343 (1980), further supports this facet of petitioner's claim. In *Hicks*, the Court struck down a 40-year sentence imposed by a jury because the trial judge, in violation of state law, had not instructed the jury that it could impose a substantially lesser sentence. Although jury sentencing is not in itself a constitutional right, *Spaziano v. Florida*, 468 U.S. 447 (1984), and although a properly instructed jury might well have imposed the same 40-year sentence upon Hicks, the Court held that the state had deprived him of his state-created liberty interest in having the jury select his sentence from the full range of alternatives available under Oklahoma law.

The Fifth Circuit has succinctly summarized the holding of *Hicks* in terms especially applicable to the present case:

> [T]o establish a valid *Hicks* claim, the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law * * * [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of these less severe sentencing options.

Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted). Here, of course, the sentencing option withheld from the jury was not, as in *Hicks*, the least severe alternative, but rather a noncapital sanction that the jury might well have found especially well-suited to the goal of incapacitation and retribution. Under these circumstances, the likelihood of prejudice is all the greater, and the rationale of *Hicks* therefore applies with special force to this case.

B. The Right to Present Mitigating Evidence.

"When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). In this case, a critical "facet of the sentencing process" about which the jury was not instructed was the meaning and effect of the jury's noncapital alternative of life imprisonment. Because this information provided a reason why the jury might have found the death penalty inappropriate in petitioner's case, and also because without it the jury could not accurately assess the weight to be accorded the other aggravating and mitigating evidence in the case, the withholding of petitioner's parole ineligibility violated yet another well-established Eighth Amendment requirement: that the capital sentencing authority consider "any relevant circumstances that could cause it to decline to impose the [death] penalty

. . . and any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. at 306; *Lockett v. Ohio, supra.*

South Carolina has sought to avoid the effect of the *Lockett* principle by declaring that a capital defendant's ineligibility for parole is not a mitigating factor; therefore, it may be declared "irrelevant" to the sentencing process as a matter of state law. *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587, 592 (1988), *cert. denied*, 489 U.S. 1091 (1989); *State v. Patterson*, 384 S.E.2d at 702-03 (declaring that parole eligibility "is not mitigating evidence and is irrelevant to a defendant's adaptability to prison life," and asserting that whether to instruct on parole is a matter of state law only); *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165, 171 (1991), *cert. denied*, 112 S.Ct. 888 (1992); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 323 (1991). But as this Court has held, unreasonably narrow definitions of "relevance" may not trump defendants' federal constitutional rights. *McKoy v. North Carolina*, 494 U.S. 433 (1990) (fact that North Carolina law treated non-unanimous jury findings of mitigating factors as "irrelevant" did not authorize exclusion of such findings from sentencing process under Eighth Amendment).

The flaw in the South Carolina Supreme Court's position is revealed by *Skipper v. South Carolina*, 476 U.S. 1 (1986), in which this Court rejected a similarly restrictive reading of *Lockett* in an analogous context. *Skipper* held that a capital sentencing authority may not be precluded from considering, as a mitigating factor, the likelihood that a convicted murderer would prove to be a cooperative and nonviolent prison inmate if sentenced to life imprisonment rather than to death. In so ruling, the Court noted that a capital defendant's likely future good behavior has no bearing on his culpability for the crime that he committed. 476 U.S. at 4. However, a defendant's future dangerousness or nondangerousness has always been regarded as a relevant sentencing consideration. *Jurek v. Texas*, 428 U.S. 262 (1976); *Barefoot v. Estelle*, 463 U.S. 880 (1983). The Court held therefore that a defendant's likely future good behavior in prison is " 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.' " *Skipper*, 476 U.S. at 4-5 (quoting *Lockett v. Ohio*, 438 U.S. at 604).

Skipper establishes that the constitutional meaning of the term "mitigating" is broader than simply that which lessens a defendant's moral blameworthiness. Although considerations of moral culpability are certainly encompassed by this concept, *see, e.g., Eddings v. Oklahoma*, 451 U.S. 104 (1982) (defendant's violent childhood must be considered in mitigation), *Skipper* shows that evidence may have little or no relevance to a defendant's moral blameworthiness, and yet be "mitigating" under the Eighth Amendment principles of *Lockett*.[21]

Skipper concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury. But *Skipper* gives no hint that the result would have differed if the information withheld from the jury in that case had been a rule of law rather than a predictive fact bearing on the defendant's future dangerousness. Indeed, as the state has already acknowledged in this case, "an individual's adaptability to prison may be more speculative than parole ineligibility . . . ." Brief of Respondent

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[21] The Court has taken a correspondingly broad view of relevance in assessing the admissibility of evidence in aggravation, recognizing, for example, that a state may properly treat as relevant to a capital sentencing decision the full range of the harm caused by the murder, regardless of whether the murderer was fully aware of that harm when he acted. *Payne v. Tennessee*, 111 S.Ct. 2597 (1991). *See generally Gregg v. Georgia*, 428 U.S. at 203-04 (joint opinion of Stewart, Powell and Stevens, JJ.) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information as possible when it makes the sentencing decision.").

in Opposition to Petition for Writ of Certiorari, at 17. Because a capital defendant's ineligibility for parole for the rest of his life bears so much more directly on whether he will pose an unacceptable risk of further violence than does his behavior in jail during the few months before trial, *Skipper* compels the conclusion that such ineligibility is a mitigating circumstance that cannot be constitutionally withheld from the sentencing jury when it is offered, as it was here, as a basis for a sentence of less than death. *Lockett*; Paduano & Smith, *Deadly Errors*, at 238-44.[22]

Petitioner's parole-ineligible status is not simply *analogous* to the prison-behavior evidence that *Skipper* held admissible as a matter of Eighth Amendment law. Rather, that status is actually an integral *part* of petitioner's *Skipper* evidence. In other words, even if petitioner's no-parole status is not deemed a mitigating circumstance in and of itself, it was nonetheless highly relevant to establish a mitigating circumstance, and its exclusion violated *Lockett* because it substantially impaired the jury's ability to assess the significance of other, indisputably relevant mitigating evidence.

Petitioner's ineligibility for parole was the indispensable factual predicate for his *Skipper* evidence. At trial he produced substantial evidence demonstrating the likelihood of his future good behavior as a prison inmate. That

[22] Petitioner must acknowledge the semantic awkwardness of characterizing a severe noncapital sentencing alternative as "mitigation." However, this awkwardness derives only from the fact that the English language does not contain a term for "mitigating in the sense that [a given fact] might serve 'as a basis for a sentence less than death,'" *Skipper*, 476 U.S. at 4-5 (internal citation omitted), rather than from any logical flaw in petitioner's claim. This is not the first case in which the Court has been confronted with an important capital sentencing concept for which no simple word could be found. *See Sawyer v. Whitley*, 112 S.Ct. 2514, 2522 (1992) (Court gives "sensible meaning . . . to the term 'actually innocent of the death penalty'" in context of abusive or defaulted habeas challenge to death sentence).

evidence unquestionably was "relevant" within the meaning of *Lockett*. *Skipper v. South Carolina, supra; Boyde v. California*, 494 U.S. at 382 n. 5 (1990). Yet the weight of that evidence was logically dependent on whether petitioner would in fact *remain* in prison if the jury spared his life. *See Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (construing *Skipper* as specifically concerned with capital defendant's right to prove his lack of future dangerousness in prison). By withholding that ineligibility from the jury, the trial judge unfairly minimized the significance that the jury would likely have accorded to petitioner's probable good behavior in prison.

Although states may provide a framework for the jury's consideration of mitigating factors, *Franklin v. Lynaugh*, 487 U.S. at 179; *Johnson v. Texas*, 113 S.Ct. 2658 (1993), they may not distort the logical significance of a defendant's mitigating evidence by arbitrary rulings that leave the sentencer with "no reliable means of giving effect to that evidence." *Graham v. Collins*, 113 S.Ct. 892, 902 (1993); *see McKoy v. North Carolina*, 494 U.S. at 452-56 (Kennedy, J., concurring). Withholding the simple truth about petitioner's parole ineligibility did exactly that. Therefore, it violated the rule of *Lockett*. *Mills v. Maryland*, 486 U.S. 367 (1988) (*Lockett* violated by jury instructions that might have impeded individual jurors' ability to give effect to mitigating factors); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

The South Carolina Supreme Court has cited this Court's decision in *Carolina v. Ramos* as support for its view that withholding a capital defendant's parole ineligibility from a sentencing jury raises no federal constitutional issue. *See, e.g., State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699, 702-03 (1989), *vacated on other grounds*, 493 U.S. 1013, (1990), 111 S.Ct. 2913 (1991). *Ramos*, however, is entirely consistent with petitioner's claim. In upholding against Eighth Amendment challenge California's decision

to provide sentencing juries with *accurate* information concerning the governor's power to commute a life-without-parole sentence, the *Ramos* Court noted the "elementary" fact that states remained free to prohibit consideration of defendants' parole eligibility as a means of providing "*greater* protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-14 (emphasis added). But given the Court's emphasis on the accuracy of the challenged commutation instruction, *id.* at 1009, *Ramos* cannot fairly be read as authority for concealing truthful, exact and crucially important sentencing information which, if known, might lead sentencing juries to choose life instead of death. *See also Caldwell v. Mississippi*, 472 U.S. at 341-43 (O'Connor, J., concurring).

III. PETITIONER'S REQUEST TO PROVIDE THE JURY WITH ACCURATE INFORMATION ABOUT HIS PAROLE INELIGIBILITY WOULD HAVE BEEN HONORED IN ALL BUT TWO OTHER COMPARABLE STATES.

Petitioner's constitutional claim is a narrow one. It does not call into question the general rule against consideration of parole *eligibility*, where capital defendants actually *are* eventually eligible for parole if not sentenced to death. *See California v. Ramos*, 463 U.S. at 1013 n. 30. Petitioner simply submits that where such eligibility does not exist as a matter of state law, rules designed to avoid speculation about whether and when parole might actually be granted are no longer necessary, and must not be misapplied to permit the very evil they were originally designed to prevent.

The practical effect of a ruling in petitioner's favor would also be relatively narrow. This is so because the capital sentencing procedures of most of the 26 capital jury-sentencing states that employ a life-without-parole alternative already comport with the constitutional principle invoked here.

In 17 of these states, the jury is expressly informed of the defendant's ineligibility for parole by the terms of the sentencing verdict or recommendation itself.[23] In three additional states, statutory or decisional

[23] These 17 jurisdictions may be divided into two subcategories: those that simply identify the jury's sentencing alternatives as death and life without parole, and those that allow the jury to specify whether a life sentence should be with or without parole eligibility. The nine states in the first category are *Alabama*, *see* Ala. Code § 13A-5-46(e) (1982) (jury recommends either death or "life imprisonment without parole"); *Arkansas*, *see* Ark. Code Ann. 5-4-603(b) (Supp. 1993) (jury may sentence to "life imprisonment without parole"); *California*, *see* Cal. Pen. Code 190.3 (West 1988) (trier of fact decides between death and a "term of life without the possibility of parole"); *see also* 1 *California Jury Instructions, Criminal* 8.84.2 (4th ed. 1979) (quoted in *Boyde v. California*, 494 U.S. at 374); *Connecticut*, *see* Conn. Gen. Stat. § 53a-46a(f) (West 1985) (verdict alternative to death is "life imprisonment without the possibility of release"); *Delaware*, *see* Del. Code Ann. tit. 11, 4209(a) (1987) (imprisonment for remainder of defendant's natural life "without the benefit of probation or parole" is the only available verdict other than death); *Louisiana*, *see* La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1993) (jury returns sentencing verdict of death or "life imprisonment without benefit of probation, parole or suspension of sentence"); *see also Lowenfield v. Phelps*, 484 U.S. 231, 235 (1988) (quoting jury instructions); *Missouri*, *see* Mo. Ann. Stat. § 565.030.4 (Vernon Supp. 1993) (after appropriate instructions and argument of counsel, jury must choose between death and "imprisonment for life without eligibility for probation or parole, or release except by act of the governor"); *New Hampshire*, *see* N.H. Rev. Stat. Ann. § 630:5 (IV) (Supp. 1992) (jury determines whether death should be imposed rather than "life imprisonment without possibility of parole"); and *Washington*, *see* Wash. Rev. Code Ann. § 10.95.030(1), 95.050 (West 1990) (jury chooses between death or "life imprisonment without possibility of release or parole").

The eight states that allow the jury to specify whether the defendant should or should not be eligible for parole are *Georgia*, *see* 1993 Georgia Laws 569, Ga. Code § 17-10-31.1(a) (Supp. 1993) (jury must select between binding sentencing alternatives of death, life imprisonment without parole, and parole-eligible life imprisonment); *Indiana*, *see* Ind. Code § 35-50-2-9 (Supp. 1993) (capital

law requires that the sentencing jury be instructed that the defendant will be ineligible for parole, either in all cases, or where (as in petitioner's case) the defendant's prior criminal record precludes his parole consideration.[24]

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sentencing juries required to recommend to the court whether "the death penalty or life imprisonment without parole, or neither, should be imposed"); *Maryland, see* Md. Ann. Code art. 27, § 413(c)(3) (1987) (jury chooses between death, life imprisonment, or "imprisonment for life without the possibility of parole"); *Nevada*, see 1993 Nev. Stat. 182; Nev. Rev. Stat. Ann. § 175.554(2)(c)(2), -(4) (1992) (jury's sentencing alternatives for first degree murder are "life imprisonment with the possibility of parole, life imprisonment without possibility of parole, or death"; jury must specify whether life sentence is to be parole-eligible); *Oklahoma, see* Okla. Stat. Ann. tit. 21, 701.10(A) (West 1993) (jury chooses between "death, life imprisonment without parole or life imprisonment"); *Humphrey v. State*, No. F-88-57, 1993 WL 380100 (Okl. Cr. Sept. 27, 1993) (death sentence rendered "fundamentally unfair" by court's failure to instruct jury on newly-enacted "life without parole" alternative to death penalty and life imprisonment); *Oregon, see* Or. Rev. Stat. § 163.105 (Supp. 1992) (jury's sentencing alternatives for aggravated murder are "death, life imprisonment without the possibility of release or parole or life imprisonment"); *Tennessee, see* Tenn. Code Ann. § 39-13-204(a), -(f)(2) (Supp. 1993) (jury must choose between death, life without possibility of parole, and life without parole for at least 25 years); and *Utah, see* Utah Code Ann. § 76-3-207(4) (Supp. 1993) (jury instructed to choose between death, "life in prison without parole," and life in prison).

[24] *Colorado* capital sentencing juries must be instructed that life imprisonment means life without the possibility of parole. Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993). In *Illinois*, a sentencing jury is to be informed that a life sentence for aggravated, repeat or multiple murder under Ill. Rev. Stat. ch. 38, para. 1005-8-1 (Smith-Hurd Supp. 1992), is for the remainder of the defendant's life, and that no such defendant "can be paroled or released, except through executive clemency." *People v. Gacho*, 122 Ill.2d 221, 522 N.E.2d 1146, 1166 (1988). The *Mississippi* Supreme Court has held that where a capital defendant is ineligible for parole by reason of his status as an habitual offender under Miss. Code Ann. § 47-7-3(1)(a) (Supp. 1992), the defendant is constitutionally entitled to have the trial judge inform the sentencing jury of his parole ineligibility. *Turner v. State*, 573 So.2d 657 (Miss. 1990), *cert. denied*, 111 S.Ct. 1695 (1991); *Mackbee v. State*, 575 So.2d 16, 38-41 (Miss. 1990); *accord Berry v. State*, 575 So.2d 1, 13-14 (Miss. 1990), *cert. denied*, 111 S.Ct. 2042 (1991).

One state, Florida, authorizes life without possibility of parole only under relatively rare circumstances, and has not yet addressed whether defendants facing such sentences are entitled to have the jury apprised of their prospective parole ineligibility.[25] Two of the remaining life-without-parole jurisdictions—South Dakota and Wyoming—have not considered the question of whether jurors should be instructed concerning the unavailability of parole under those states' current bifurcated capital sentencing procedures.[26]

This leaves only two jurisdictions other than South Carolina, Pennsylvania and Virginia, that impose life without possibility of parole on some or all convicted murderers but refuse to require that judges inform capital sentencing juries of that fact.[27] Neither the Penn-

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[25] A newly-enacted Florida statute provides for a sentence of "imprisonment for life without possibility of early release" for the first degree murder of any law enforcement officer. 1993 Fla. Sess. Law Serv. 93-406, S.B. 26-B, § 16; Fla. Stat. 775.0823(1) (effective 1/1/94). Florida law also provides for a life without parole sentence for drug trafficking murders when death is not imposed. Fla. Stat. 921.142 (West 1992). While the Florida courts have not construed either of these provisions, the state supreme court has approved for publication pattern jury instructions that inform capital sentencing juries of the no-parole feature of § 775.0823(1). *Standard Jury Instructions—Criminal Cases*, 603 So.2d 1175, 1205 (Fla. 1992).

[26] *See* S.D. Codified Laws Ann. § 24-15-4 (1988); Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (Supp. 1992).

[27] 61 Pa. Cons. Stat. Ann. § 331.21 (Supp. 1993) (parole board may not release life prisoners); *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929, 941 (1990), *cert. denied*, 499 U.S. 931 (1991); *Commonwealth v. Strong*, 522 Pa. 445, 563 A.2d 479, 485-86 (1989), *cert. denied*, 494 U.S. 1060 (1990); Va. Code § 18.2-10, -31 (Supp. 1991) (Class 1 felony punishable by death or life imprisonment); Va. Code Ann. § 53.1-151(B) (Supp. 1992) (certain recidivists

sylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[28]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in at least 20 life without parole states petitioner's request would have been unnecessary, because the trial judge would have submitted verdict forms to the jury making

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ineligible for parole); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S.Ct. 88 (1991); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988); *see also O'Dell v. Thompson*, 112 S.Ct. 618 (1991) (Blackmun, J., opinion respecting denial of certiorari). For a detailed discussion of the constitutionality of Virginia's treatment of this issue before *O'Dell*, see William W. Hood, III, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989).

[28] One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, § 9(a) (1969) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 (1987) ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . ."). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, *see California v. Ramos*, 463 U.S. at 1009, it is perhaps arguable that a state may exclude all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may *not* be modified by gubernatorial commutation. Ala. Const. amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (1976) (same); *see* Wright, *supra* n.4, at 550 n.141.

clear that the life sentence alternative was without possibility of parole, or else would have instructed the jury to that effect.[29]

Although such an overwhelming weight of authority among life-without-parole jurisdictions does not, in and of itself, condemn as unconstitutional the practices of the three minority states, the readiness of all but a few states to enlighten the jury on the point surely suggests the importance of the information at issue. The Court's observation regarding the general rule governing submission of lesser included offenses in *Beck v. Alabama* could be said of parole ineligibility as well: "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U.S. at 636-37.

IV. THE STATE'S CONCEALMENT OF THE LIFE-WITHOUT-PAROLE OPTION UNDERMINED THE JURY'S CONSTITUTIONAL ROLE AS A LINK BETWEEN THE PENAL SYSTEM AND CONTEMPORARY COMMUNITY VALUES.

Before concluding, petitioner would make a final observation about South Carolina's refusal to provide juries with essential information about the true severity of their non-capital sentencing option. This Court's cases have frequently noted the importance of the jury as "a significant and reliable objective index of contemporary values" regarding the death penalty. *Gregg v. Georgia*, 428 U.S. at 181. *See Stanford v. Kentucky*, 492 U.S. 361, 393-94 (1989) (assessing evidence of jury capital sentencing behavior respecting 16-year-old and 17-year-old murderers); *Enmund v. Florida*, 458 U.S. 782, 794-96

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[29] In four additional states, the capital sentencing decision is made by the trial judge alone or by a sentencing panel of judges. Thus in these states as well, the sentencing authority is fully aware of the precise parole status of life-sentenced murderers. Ariz. Rev. Stat. Ann. § 13-703(B) (Supp. 1993); Idaho Code § 19-2515(d) (Michie 1987); Mont. Code Ann. § 46-18-301 (1993); Neb. Rev. Stat. § 29-2520 (1993).

(1982) (same; death penalty for unintended felony murder); *Coker v. Georgia,* 433 U.S. 584, 596-97 (1977) (same; death penalty for rape). But in order for the jury to serve this "important function" of "maintain[ing] a link between contemporary community values and the penal system," *Witherspoon v. Illinois,* 391 U.S. 510, 519 n. 20 (1968), jurors must be apprised of the rudimentary facts concerning how the penal system operates. The historical process by which virtually all severe corporal punishments have disappeared from American criminal justice shows why this is so.

Debating the proposed Cruel and Unusual Punishments Clause of the Eighth Amendment on the floor of the First Congress, Rep. Livermore thought it self-evident that "villains often deserve whipping, and perhaps having their ears cut off . . . ." 1 Annals of Cong. 754 (1789), *quoted in Furman v. Georgia,* 408 U.S. 238, 262 (1972) (Brennan, J., concurring). The subsequent disappearance of both flogging and mutilation as criminal punishments —a disappearance so complete that such punishments would unquestionably be deemed cruel and unusual under the Clause today—is the clearest example of how, in "set[ting] its face against" given forms of punishment, *Stanford v. Kentucky,* 492 U.S. at 378, this nation establishes "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). But these corporal punishments did not simply disappear. Rather, during the course of the nineteenth century they were *replaced.* Their replacement was imprisonment—a practical alternative that scarcely existed in the colonial era. *See* Lawrence M. Friedman, *Crime and Punishment in American History* 74-82 (1993). For this process of substitution to have worked as it did, it was essential that the decision-maker—whether legislature, judge or jury—be aware that an alternative to flogging or mutilation existed. Once legislative and sentencing authorities were provided with this alternative, there began an evolutionary process that culminated in

the total rejection of the older forms of punishment. But had sentencing authorities been prevented from considering noncorporal punishments, there can be no doubt that flogging and mutilation would have persisted as criminal sanctions for appreciably longer periods of time.

South Carolina was free to make the judgment that life without parole was too unworkable, costly, or otherwise problematic a punishment to enact as an alternative to the death penalty. But having adopted that alternative punishment, the state was not entitled to short-circuit and distort the sentencing judgment of juries in individual cases by concealing its existence. Because South Carolina did just that here, petitioner submits that his sentence of death may not be carried out.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

Respectfully submitted,

DAVID I. BRUCK *
(Appointed by this Court)
P. O. Box 11744
Columbia, South Carolina 29211
(803) 765-1044

M. ANNE PEARCE
Assistant Appellate Defender
1122 Lady Street
Suite 940
Columbia, South Carolina 29201
(803) 734-1330

* Counsel of Record

Attorneys for Petitioner